CIVIL MALPRACTICE SUITS:

HOW CAN THE PHYSICIAN PROTECT HIMSELF AGAINST THEM?*

BY J. R. WEIST, A. M., M. D.

Every surgeon and every physician who treats surgical cases should know that civil suits for damages resulting from alleged malpractice are becoming so frequent in some parts of the country as to excite serious alarm in the minds of those who have given attention to the subject. It is so common an occurrence for the surgical treatment of the oldest and best physicians and surgeons to be called in question and overhauled in courts of justice, so called, as to cause a general feeling of alarm in the profession, and a conviction that the business of adjusting fractures, reducing dislocations, and performing other surgical operations is, at best, very dangerous so far as property and reputation are concerned. The result is that some of the most thoroughly qualified medical men are considering the propriety of refusing to attend surgical cases and confining their practice to that of medicine alone. They say, and very correctly, the fees usually received for attending surgical cases do not warrant a man of property in exposing himself to the probability of having, sooner or later, to defend his treatment in an action for damages in which malpractice is charged.

These gentlemen know that a compromise of such a case by the payment of a sum of money is destructive to their reputation and sullies the honor of the profession. To defend themselves in the action is to place their professional standing and their property at the mercy of a jury nearly always composed of men selected because of their ignorance, who are wholly incompetent to understand the scientific questions involved, the evidence, or the law applying to the case. They also know that a successful defense even is in one sense defeat, because the disgrace, vexation, and cost are generally ruinous.

* Read before the State Medical Society of Indiana, June 11, 1884.

That the members of a profession which has done so much for the advancement of the human race, which excels all others in acts of charity and benevolence, and one to which all men turn for relief when disease comes upon them, should be placed in the unfortunate position described is evidence of defects in the profession itself, in the law, or in its administration; defects urgently demanding a remedy. I propose to briefly consider these questions, in order that relief may be sought for in wisely considered efforts.

That the profession itself is partly responsible for the evil threatening it is evident on the slightest consideration. The standard of education and honesty is so low as to permit an easy entrance into the profession, hence the ranks of medicine are crowded, and the number of medical men far in excess of the demand. This results in a struggle for business in which are employed the arts and dishonest tricks of trade; reputation is sought at the expense of others. The work of a competitor is decried, and the dissatisfaction of a patient encouraged. The remedy for these evils in the profession involves many and grave problems in sociology which I can not now stop to consider. I simply present as a general proposition, that every action for civil malpractice is directly or indirectly encouraged or supported by one or more medical men, rivals in business of the defendant, and for a dishonest purpose. If this proposition is true, every right-minded medical man should seek to know such offenders and aid in bringing upon them the obloquy they deserve; and medical societies should inflict upon them their heaviest penalties. Such action should be taken, not only in the interests of justice, but for self-preservation.

The profession has no reason to complain of the responsibility imposed by the law on the physician and surgeon. The measure of this is well laid down in "Hilliard's Law of Torts" (2 ed., vol 1. p. 253), from which I quote:

> In general, a physician or surgeon is responsible only for *ordinary* or *reasonable* care and skill and the exercise of his best judgment in matters of doubt, not for a want of the highest degree

of skill. It is the duty of the patient to co-operate with his professional adviser and to conform to the necessary prescriptions; and if he will not, or, under the pressure of pain, he can not, he has no right to hold his surgeon responsible for his own neglect. The implied contract of a surgeon is not to *cure*, but to *possess* and *employ* in the treatment of a case such reasonable skill and diligence as are ordinarily exercised in his profession by thoroughly educated surgeons; and, in judging of the degree of skill required, regard is had to the advanced state of the profession at the time. A physician is expected to practice according to his professed and avowed system, where there is no particular system established or favored by law, and no system prohibited.*

Courts take no notice of the different "Schools" in medicine—the term "Physician," in Indiana, being legally assumed by any one who chooses to announce himself as a practitioner of medicine, and registers his name with the county clerk. The law recognizes all systems as legitimate. There is nothing unreasonable in these requirements of the law, and they are no more than are required of the other professions; that which is pronounced as settled in medicine or surgery by the leading and standard authorities is within the reach of every practitioner. If he has failed to duly qualify himself, or fails to diligently apply his knowledge, he should be held to the highest responsibility. It is not of the law in relation to the responsibilities of the surgeon we complain, but of the faulty execution of the law, or rather of the vexation and expense to which the surgeon is put to defend himself against a false charge of violating it. It is a protection against these we seek.

To show how much it is needed I shall suppose a case. Dr. A. is summoned to see B. who has a bad compound fracture of the elbow, received by falling in a drunken fit from a wagon. Dr. A. knows he will probably never receive any thing for his

*See comments on this by McClelland, Civil Malpractice, p. 18. Those interested in knowing more about the responsibility to which the medical man is held by the law, may consult Leighton v. Sargent, 7 Foster's Reports, 460; Elwell's Malpractice and Medical Evidence, 142; Long v. Morrison, 14 Ind. 595; Peck v. Marten, 17 Ind. 115. Hibberd v. Thompson, 109 Mass. 286; Scudder v. Crosson, 43 Ind. 343; Gramm v. Boener, 56 Ind. 502.

services, yet, actuated by a high sense of professional duty, he spends two or three dollars for proper splints, dresses the arm in the most approved method, and continues to give it careful attention for five or six weeks, visiting the case twice as often as necessary, upon the urgent demand of the patient, who is only satisfied with at least double the attention expected by an intelligent and prompt paying patient.

At the conclusion of the case, because of the character of the original injury, the bad constitution of the patient, or his failure to carry out the directions given, there is some deformity, perhaps partial anchylosis. Very soon some "Bushwacking" doctor becomes greatly interested in the patient, he is very sorry he is crippled for life, he inquires who treated the arm. When told, he is much surprised, nods his head with an air of profound wisdom, and asks if Dr. A. did this, that, and the other thing. When answered in the negative, his wonder is much increased; he tells that *he* has treated many cases worse than this, but never had so bad a result. He states the precise cause of the difficulty, using professional terms that profoundly impress the patient because he does not understand them, reads, possibly, what Dr. Gross or Dr. Hamilton says about such injuries, and makes demonstrations on a skeleton. He perhaps directly charges Dr. A. with ignorance, or carelessness; if more politic, he "*damns with faint praise.*" Whichever course is followed leads to a conviction in the mind of the patient that he has been badly treated by Dr. A. Possibly there is no actual intention to injure Dr. A., but the struggle for business in an overcrowded profession leads often to disparagement of a competitor that the doctor's learning and skill may be made prominent by contrast. When doubt about the proper management of his case has once entered the mind of a patient, there is no difficulty in getting opinions that will convert it into certainty; for it is evident that the profession is filled with incompetent, careless, and dishonest men—men who nearly always escape suits for malpractice, but who do much to have them instituted against others. B., supported by the professional opinions noticed, finds an attorney

who urges him to sue Dr. A. for malpractice, and who will undertake the prosecution of the case for a contingent fee. Dr. A., having proper respect for himself and the profession, declines to pay a large sum of money as a compromise, and the case comes to trial. The plaintiff has no trouble in securing abundance of testimony from the class of doctors who encouraged the prosecution of the suit, and who secretly rejoice at the difficultly and disgrace of the defendant. Dr. A., feeling that his reputation and business are at stake, employs one or more prominent attorneys who do not work for small fees, secures the attendance of a number of prominent surgeons from the nearest large city by the payment of a liberal sum in compensation for their loss of business and for their expenses. The trial lasts from one day to three weeks. At its conclusion, after the plaintiff's attorneys have denounced Dr. A. as an ignorant and dishonest doctor, as a man little better than a murderer, the case is submitted—to whom? To a number of scientific and honest physicians or surgeons who, because of their learning and experience, are competent to weigh the testimony, judge correctly of the present condition of the plaintiff and understand the law governing the case? No; but to a jury, generally composed of men wholly ignorant of anatomy, medicine, or surgery, men whose judgment about an ordinary business transaction would be laughed at, men having only one qualification to sit in the jury box, that of ignorance. In these cases it is well known that whatever be the character of the evidence the balance of probabilities inclines strongly to a verdict against the surgeon. If such a verdict is rendered in our hypothetical case unjustly, Dr. A. is consoled by the reflection that "he can carry his case to a higher court, where judges whose duty it is to review the case, and whose function it is to sift evidence and to judge equitably, will probably remedy the evil by remanding for a new trial, which if there be right on his side, is nearly equivalent to a verdict in his favor." This knowledge, however, does not pay him for the vexation and trouble he has had, does not restore the reputation he has lost, nor put back into his pocket the money he has paid

out to his attorneys, to his witnesses, and for court fees. B., the plaintiff, having no property, A., the defendant, although gaining the case, by the law of Indiana is compelled to pay his own costs. For the same reason a suit for damages against B. can afford no satisfaction, while one for barratry or maintenance against those who encouraged the bringing of the suit, or officiously intermeddled with it by assisting the plaintiff in its prosecution, can hardly be maintained, as the Indiana Statute (§ 2042) requires frequent actions of this kind to constitute guilt.

When Dr. A. finally gets through with the case, his reflections can hardly be other than bitter. His benevolence, that led him to give his time and professional skill to a suffering, moneyless, and perhaps friendless wretch, has indeed borne bad fruit. If he has been mulcted several hundreds or thousands of dollars in addition to his other costs, and incurred a corresponding amount of social and professional disgrace, he is virtually ruined.

The imaginary case I have given can be easily paralleled by real ones. And the fact can not be disputed that, whenever the physician or surgeon treats a fractured limb, reduces a dislocation or performs any other surgical operation, whether his reputation be small or great, he places it with his business and his property in the hands and at the mercy of his patient, be the patient intelligent, honest, and responsible, poverty-stricken, a thief or a fool!

Frequently the charge of malpractice is only made to escape the payment of a just bill. If a suit is brought for this, a counter-claim is made for damages. The surgeon is immediately by this action placed on the defensive and subjected to all the trouble, risk of reputation, and expense before recited.

A few years ago I sued a patient for services rendered, and although I had given him a great deal of good surgical attention, and literally kept him and family from suffering for the common necessities of life, and been influential in securing an allowance of a large sum of money by a railroad company for his injury,

he attempted to offset the bill by a claim of damages from malpractice to the amount of $10,000. Although I gained my case on two trials, and was given judgment for a sum more than sufficient to pay all expenses, my neglect of business during the progress of the case and anxiety made me a loser in the end.

On examination of the Court Records in a county adjoining my own, I find that medical men of one county alone have within the last five or six years paid out about $14,000 as damages and in making defense in malpractice suits. In addition they have been at great expense from loss of reputation and business. A number of other suits are pending at the present time in the same county. Throughout the State, and indeed in many parts of the West, a similar state of affairs exists.

Is it any wonder that intelligent surgeons, alarmed at the frequency of malpractice suits, are asking if there are no means of protection against them? They do not ask exemption from the penalties of the law when they fail to *possess* or *employ* the highest knowledge and skill attained by the profession, or that "its heaviest judgment be not visited on those who ignorantly, drunkenly, and grossly trifle with health and human life," but that they be not held responsible for not doing perfectly what is absolutely impossible, and that those who do their work honestly and well shall not be made to suffer as much in reputation and property in establishing their innocence as the guilty subjected to the penalties of the law. That they are so made to suffer by the institution of suits for damages, when actions have no foundation upon which to rest either in equity or law, is apparent from what I have already written. It becomes then an important question, especially when dealing with irresponsible patients, whether or not the medical man can in any way forestall such action on the part of the patient, and thus prevent it. To obtain legal information on the point I addressed the following note to L. D. Stubbs, Esq., a prominent attorney in Eastern Indiana:

RICHMOND, IND., February 28, 1884.

L. D. STUBBS, ESQ., Att'y, etc:

Dear Sir: Please give me a written opinion on the following question: When called to treat a medical or surgical case, can the physician or surgeon by any sort of agreement—written or otherwise—protect himself against a suit for malpractice?

Respectfully, J. R. WEIST, M.D.

In reply I received, under date of March 8, 1884, an elaborate opinion, defining malpractice, and the contract of the physician as implied in law, which does not differ from that already given. Some legal principles are recited and decisions referred to, after which he says:

If the physician or surgeon therefore informs the patient whose case he takes, that he does not know any thing in regard to his profession, or the physician or surgeon, instead of acting upon his own judgment, acts under and upon the judgment and instruction of the patient, he being a person of mature years and sound mind, and after having protested against the course pursued, and fully informed his patient of his judgment, and the unreasonableness of that of his patient, he will not be liable in an action against him, if the result is not favorable. But if the physician or surgeon asserts, either explicitly or impliedly that he has the ordinary skill and knowledge appertaining to physicians and surgeons in such localities as that in which he resides, and undertakes to, and does act upon his own judgment, he can not make any contract by which he shall not be liable for a lack of that skill which he assumes to possess, or for negligence, or willful injuries, or for injuries arising from mistakes, which ordinary knowledge would have prevented or ordinary skill avoided.

After giving the legal definition of negligence, he says:

To allow a physician by contract to exculpate himself from responsibility on account of negligence or willful injuries to his patient would be clearly against public policy. It would open a field of the greatest safety for every quack in the land, and remove the greatest of inducements now existing to professional skill and good faith in practice.

A common carrier can not limit his common-law liability by contract so as to exempt him from the consequences of his own negligence or misconduct, because it is against public policy.

Why then should a physician be exempt, life and health being more important than property? It is my opinion that it is so clearly to the public interest that those persons to whom those in physical distress and affliction are compelled to apply for relief shall bring to their calling the highest skill and knowledge that is reasonably attainable, and when, as is often the case, there is neither time nor opportunity to make discriminating choice, or drive prudent bargains, it would be highly detrimental to the public to allow the physician to provide against the consequences of neglect, or willful wrongs, by driving a sharp bargain, or by any kind of a contract.

This opinion makes it apparent the surgeon can not guard himself against danger by an agreement with the patient, as no reputable man could lower himself to the assumption of the rôle of an ignoramus. Even if he did so, and it were shown that he possessed ordinary knowledge and skill, the contract would probably be declared void because of the element of fraud entering into it.

It has been held by some medical men that if the person desiring to bring a suit for malpractice were required to give a bond to secure the surgeon against damages and costs in the event of a failure to establish his charge, the number of suits would be lessened, because a large proportion of them are commenced by irresponsible persons who would find it difficult to give such security. They have further held that, as in a suit for the collection of a debt, before a writ of attachment can be issued the plaintiff must give a bond for damages to secure the debtor against injury should the issue of the case show an illegal seizure of his property, justice equally requires that a similar bond should be given when both the reputation and the property of the surgeon are attacked. At first view both of these positions appear correct, but a little examination will show that they can not be maintained. As to the first, it is a principle of law that poverty shall debar no one from justice. Were such a bond required, a person who had received injury might fail to obtain justice solely because his poverty prevented his giving it. It would therefore be clearly against public policy to permit an action having this effect, or that might shield a surgeon against

the consequences of his own ignorance or carelessness. In the second position, the examples are unlike. In the first, the property of the debtor is seized and he deprived of its use and benefit before the case is heard, that is, before a lawful claim upon him is shown to exist. In the second, the surgeon is not deprived of his reputation or property before his defense is made, not until, after due trial, he has been adjudged guilty.

For the reasons given we may not expect the enactment of a law requiring a person bringing suit for damages because of malpractice on the part of a physician or surgeon to secure costs or damages resulting to the defendant by the execution of a bond.

In some States—New York, for example—there is a law by which a judge in certain civil cases, including suits for malpractice, can make an allowance for defendant's costs and for damages where plaintiffs fail to sustain their case. There is no provision of this kind in the statutes of Indiana. Such a law would bring partial relief in certain cases. These allowances being made against the plaintiff, if he has no property, and this is generally the case, the law affords no relief to the defendants.

It appearing that a law can not be enacted which will lessen the number of malpractice suits, nor one which will in the majority of cases relieve from costs the physician or surgeon making a successful defense, it remains to consider the questions, Can the manner of trial of these cases be so changed that professional and scientific questions shall not be decided by a jury, generally, at least, totally unable to comprehend them? If not, can the method of introducing expert testimony be changed so that it will be in the interests of justice instead of the side calling it, as is too frequently the case under the present system of practice. Such testimony should, by its influence upon the jury, increase the chances of a just verdict being rendered. Now it usually lessens them, besides, from its character, tending to bring the reputation of the profession into disgrace and medical science to shame. In relation to the first inquiry it may be said, if the questions arising in these cases in regard to the nature

of injuries, methods of treatment, and results, could be submitted to the arbitration of a number of learned and honest physicians or surgeons, whose decision would be final, civil malpractice suits would be but little dreaded by the well-informed and honest medical man. While this might be done under the law in all cases, if both parties to the action consented, it is seldom the plaintiff will agree to arbitration, and he can not be compelled to it, as section twenty of the Bill of Rights says: "In all civil cases the right of trial by jury shall remain inviolate."

The second question, relating to expert testimony, having been submitted to the Hon. W. D. Foulke, of Richmond, Indiana, State Senator, etc., elicted the following answer:

The question submitted is, how to obviate the dangers of the present system of expert testimony in determining the skill and diligence of physicians in actions of malpractice. Several remedies have been suggested. Prof. Ordronaux, in the *American Journal of Insanity*, of January, 1874, proposes to remove all experts from the field of testimony and place them in that of arbitration, so far as any particular scientific question is to be decided, and suggests that whenever such a one arises, whose solution is material, that a feigned issue should be made upon the point, and referred for judgment upon evidence agreed upon to three experts, one to be selected by each party litigant and the third by the court, such experts to determine at once the question in dispute, and their opinion to be received by the jury as conclusive of the issue tried by them. That counsel should give notice to the court of the intention to invoke the testimony of experts, so that the scientific issue could be tried in advance of the trial of the cause. This seems objectionable upon several grounds. (1) It would allow considerable complication of the issues, and add to the expense of litigation. (2) It can not always be possible to know in advance what expert testimony will be required, and upon what particular points. (3) It is of doubtful constitutionality, as it would take away from the jury the right to decide in regard to the issues submitted. A plan submitted to the Legislature of Massachusetts by a committee of medical societies of that State seems preferable. They urged the impropriety of compelling honest and honorable experts, who had made themselves masters of a science by study, observation, and experience, to put themselves in conflict in open court upon terms

of equality with pretenders, who were willing to lend themselves and the science which they pretend to promote to the views or interests of their employers, and this, too, when the comparative claims of the two were to be passed upon and determined by jurors drawn from various pursuits of life and uninformed in the matters on which they were called upon to judge. And it was complained that life and property should not depend upon the haphazard result to which such a jury might come in trying to distinguish what might be true or false in science. The bill in that case referred to questions of homicide, but there is no reason why its provisions should not apply to civil actions for malpractice. It provided that "if in the trial of any issue in any court the presiding judge should be of opinion that the testimony of one or more expert witnesses, versed in matters of skill or science, a knowledge of which is material to a satisfactory determination of such issue, or may be useful or important in such trial, it shall be competent for such judge, upon the application of either party to such issue and after a hearing of such parties, if they shall desire it, to select and appoint one or more such expert witnesses, and to require their attendance to give testimony in such trial. And the witnesses so selected and appointed shall attend and be examined in the same manner as other and ordinary witnesses when testifying in the trial of such issues. The court shall allow such witnesses, for their services and attendance in such trial, such sum as may be adjudged reasonable, to be advanced and paid as is provided in respect to the fees of ordinary witnesses. And the sums so advanced and paid by either party if prevailing in the suit shall be charged by and allowed to him as a part of his costs, as in the case of other witnesses, unless the court for good cause shall order otherwise. Neither party shall be entitled to claim a delay or continuance of any trial for the purpose of calling in the testimony of expert witnesses unless the court shall be satisfied that there has been no unreasonable delay in making application for such appointment.

This plan would seem to present the fewest objections. The issues would not be complicated. No right of deciding any thing would be taken away from the jury, it would simply be left in the power of the court to determine what experts should be selected. As the law stands at present, the court must decide upon the examination of the witness himself as to whether he has sufficient knowledge to be an expert. By the proposed law a much wider discretion would be left to the court, who would

have the right to select or reject any such witness. This right of selection must rest somewhere. It is safer perhaps with the court than any where else. A permanent expert organization would not be conveniently accessible. On the trial of cases the great advantage attained would be that the experts examined would not be the experts of the particular parties to the action who called them, but would be the experts of the court, and would be apt to discharge their duties in a much more impartial manner. It is also to be presumed that more competent persons would be chosen than under the present system. So too the expenses of trial would be considerably lessened, the number of experts being materially reduced.

A law of the kind proposed by Mr. Foulke would afford great protection to the honest and well informed surgeon—and greatly aid justice in all cases requiring expert testimony; and as such a one is probably the only law the medical profession can hope to secure bearing upon the subject, the county society I represent has caused the following bill to be drawn up by Mr. Foulke, and ordered her delegates to present the same to this Society, and ask the passage of a resolution praying the General Assembly of the State of Indiana to act favorably upon the bill when presented.*

Be it enacted by the General Assembly of the State of Indiana, That if in the trial of an issue in any of the courts of this State, except courts of Justices of the Peace, the judge shall be of opinion that the testimony of one or more expert witnesses versed in matters of skill and science, a knowledge of which is material to a satisfactory determination of such issue, may be useful or important for such trial, it shall be competent for such judge, upon the application of either party to such issue, upon notice to the other party, to select and appoint one or more such expert witnesses, and to require their attendance to give testimony on such trial, and the witnesses so selected and appointed shall attend and be examined in the same manner as other and ordinary witnesses when testifying in trial of such issues.

*The State Medical Society, received the bill favorably, and appointed a committee to consider the subject and urge upon the legislature the necessity of passing this or a similar bill.

The court shall allow such witnesses, for their services and attendance in such trial, such sum as may be adjudged reasonable, to be paid as is provided in respect to ordinary witnesses. And the sums so paid shall be charged and allowed as costs, as in the case of other witnesses, unless court for good cause shall order otherwise.

SEC. 2. Neither party shall be entitled to claim a delay or continuance of any trial for the purpose of calling in the testimony of expert witnesses, unless the court shall be satisfied that there has been no unreasonable delay in making application for such appointment.

SEC. 3. Expert witnesses so appointed by the court may be examined on deposition, as other witnesses.

SEC. 4. Neither party shall examine any expert witnesses as to any matters of skill and science over the objection of the other party, unless such witnesses shall have been appointed by the court as aforesaid.

In conclusion, the following extract from McClellan (Civil Malpractice, p. 528) contains perhaps the best general advice that can be given as to the individual measures to be taken. He says:

To avoid the annoyance of such suits, surgeons should above all the things be *honest* with their patients, apprising them of the difficulties of the case and the uncertainty of perfect results. They may do this without being "forward to make gloomy prognostication." They should be "candid in regard to their deficiencies, claiming no more than they can perform, no more knowledge than they possess; claiming no more for their art than belongs to it. Especially when acting as experts in courts of law, they should remember that other surgeons set broken limbs, as they write their names, after a manner of their own," and that good results have and may be obtained by a variety of methods of treatment. So long as these are amenable to the rule of common-sense they should not be decried, as is too often the case.

Surgeons should look carefully to their appliances, instructing their patients and nurses as to their uses, remembering that they are not familiar with these things, hence will need explanation and directions in plain English, and need them more than once. If any thing arises that seems to them wrong, or which they do not comprehend, they should be instructed to give the surgeon instant notice.

If possible the surgeon should have one or more *disinterested witnesses* present to observe his *omissions* and *commissions* and his reasons

for the same. If after all this, the annoyance of a suit should follow, get the best legal talent the country affords, seek for experts among *truthful*, *honest* physicians; secure men who are able in their profession, yet who are not ashamed to acknowledge the deficiencies of their art; see that your counsel comprehends the case; comprehend it yourself in all its details.

Under no circumstances should such suits be compromised. Surgeons, after performing their duty, owe it to their professional brethren to let the matter be tried by the letter of the law.

And I add, use all your influence to secure a proper feeling in the profession on the subject, and an understanding of the matter by the people. Let the latter know that it is disgraceful that, in the enlightened State of Indiana, the honest and skillful surgeon while in the exercise of his profession has practically no protection for his reputation and property against the assaults of dishonest patients, to whom he has probably rendered without reward the highest professional service; that if the present state of affairs continues, the surgeon will be driven to the expedient of holding no property in his own right. By doing this, you may aid in securing to the physician and surgeon, "that protection in the performance of their arduous duties which is justly and equitably their right."

RICHMOND, IND.